United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR PETITIONER AND JOINT APPENDIX

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9051 352

U. S. ELECTRICAL MOTORS, INC., a Corporation, *Petitioner on Review,*

v.

JESSE H. JONES AND HANS A. KLAGSBRUNN, Members of the Board of Directors of Defense Plant Corporation, et al., *Respondents on Review.*

On Petition to Review the Decision of the Tax Court of the United States.

United States Court of Appeals
for the District of Columbia
FILED OCT 10 1945
Joseph W. Stewart
CLERK

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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v.

JESSE H. JONES, ET AL., *Respondent on Review.*

On Petition to Review the Decision of the Tax Court of the United States.

BRIEF ON BEHALF OF PETITIONER.

NATURE OF PROCEEDING.

This proceeding involves the jurisdiction of The Tax Court of the United States to entertain a petition filed with it on the 2nd day of October, 1944, by the petitioner to have reviewed a determination by the Price Adjustment Board of the Reconstruction Finance Corporation fixing the amount of alleged excessive profits realized under contracts to supply facilities used in the prosecution of the war.

OPINION BELOW.

The memorandum opinion or "Order of Dismissal" of The Tax Court was entered February 28, 1945, and the petition for review was filed in The Tax Court on the 23rd day of May, 1945, and record was filed in this Court on June 27, 1945. (App. pp. 16, 17 and 18)

QUESTION PRESENTED.

What is the effective event which starts the 90 day period within which petitioner may file a petition for review with The Tax Court of the United States under the provisions of Sec. 403(e)(1) or (2) of the National Defense Appropriation Act of 1942, as amended by Section 701(b) of the Revenue Act of 1943?

STATUTES.

Section 403(e)(1) and (2) of the National Defense Appropriation Act of 1942, as amended, reads in part as follows:

> "(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) *after the mailing of the notice* of such order under subsection (c)(1), file a petition with the Tax Court of the United States for a redetermination thereof. * * *
>
> "(2) * * * Any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) *after the date of such determination* file

a petition with The Tax Court of the United States for a redetermination thereof."

STATEMENT.

By a written document which purports to be dated "July 3, 1944" there appears to have been made an unilateral *determination* by the Price Adjustment Board of the Reconstruction Finance Corporation that petitioner had realized "excessive profits" in the amount of $36,000 during the fiscal year ended December 31, 1942. Said unilateral determination is in the nature of a "*finding of fact and opinion* by the Chairman of the Reconstruction Finance Corporation Price Adjustment Board"; and on the left side of the last page of said document, opposite the signature of the Chairman, there appears the notation "June 14, 1944". Other than the notation of "July 3, 1944" on the upper right hand corner of the first page of said document, and the notation of "June 14, 1944" on the left side of the last page of said document, it does not appear to *have a date*. (App. pp. 9 to 13)

By a document that bears the date of July 6, 1944, on the letterhead of the Reconstruction Finance Corporation, addressed to petitioner and signed by "Facius W. Davis, Treasurer", it is stated, viz:

"JUL 6 1944

U. S. Electrical Motors, Inc.
Los Angeles 54, California

Gentlemen:

Enclosed is a signed copy, dated June 14, 1944, of a Determination and Order entered in proceedings for the renegotiation of profits realized under your contracts and subcontracts during your fiscal year ended December 31, 1942, pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as last amended July 14, 1943 and as affected by Title VII of the Revenue Act of 1943.

You will observe, from an examination of that document, that this Board has determined that $36,000 of profits realized by you during the fiscal year under review were excessive, and that under its terms you are ordered and directed to repay excessive profits in that amount less the amount of any tax credit to which you may be entitled pursuant to Section 3806 of the Internal Revenue Code. Your Internal Revenue Agent in Charge, in a letter dated May 25, 1944 (a copy of which is enclosed), has informed this Board that the aggregate amount of the credit to which you are thus entitled is $28,800.

Accordingly, under the terms of the Determination and Order referred to, you are required to pay to this Board the sum of $7,200, which you are requested to remit to us by return mail in the form of a certified check or draft made payable to the order of the 'RFC Price Adjustment Board'. The check or draft should be mailed to the RFC Price Adjustment Board, 811 Vermont Avenue, N. W., Washington (25), D. C., to the attention of the undersigned.

Very truly yours,

(Sgd) FACIUS W. DAVIS
Facius W. Davis
Treasurer."

(R. p. 9)

The foregoing letter was the *first notice* that petitioner received that there had been a *determination* made by the Price Adjustment Board of the Reconstruction Finance Corporation with respect to alleged "excessive profits" under contracts with the Government or an agency thereof.

Within 90 days from the date of said notice of July 6, 1944, and also within 90 days from the date of "July 3, 1944", appearing as the date of said unilateral document, a petition for review of said determination was filed with The Tax Court of the United States. (App. p. 2 *et seq.*)

In the order of dismissal entered by The Tax Court it undertakes to make a finding that goes to the question of

its *jurisdiction* rather than a determination of the "amount of excessive profits" whether less than, equal to, or greater than that determined by the Price Adjustment Board of Reconstruction Finance Corporation. (App. pp. 16 and 17)

The jurisdiction of The Tax Court is exclusive; but its decisions are *final* and not subject to review only when it *determines* the *amount*, if any, of such "excessive profits". The Tax Court has not made a determination of any amount; but has sought to exercise its basic powers on the question of procedure.

ARGUMENT.

A. The Tax Court has jurisdiction of this proceeding.

The provisions of paragraphs (1) and (2) of Subsection (c) of Section 403 of the National Defense Appropriation Act, as amended by Section 701(b) of the Revenue Act of 1943, are mutually inclusive with respect to the jurisdiction of The Tax Court; and with respect to the time within which a petition for review may be filed with The Tax Court, there must be a *specific event* of which the contractor has notice.

There are three classes of renegotiation proceedings that may be reviewed by The Tax Court, viz: (1) Proceedings involving fiscal years ending after July 1, 1943; (2) proceedings involving fiscal years ended before July 1, 1943 (in which a determination is made prior to the date of the enactment of the Revenue Act of 1943); and (3) proceedings for fiscal years ending before July 1, 1943 (in which a determination is made after the date of the enactment of the Revenue Act of 1943). The enactment date of the Revenue Act of 1943 is *February 25, 1944.*

The event which starts the period of 90 days for an appeal in the first two classes of proceedings for review is definite; but with respect to the third class it appears to be the intent of Congress that a *determination* shall be *mailed* to the contractor on the day of its date. The Congress must

have intended that *some notice* of a *determination* be given the contractor. There is no requirement in the statute that the *determination* in the third class of proceedings shall be in writing; but if that requirement is inferred, there is no reason to say that the *Secretary* making the determination might give it a date and send notice of the determination some 15, 30, 60 or 90 days after the *date* it is *made*.

The Secretary is required to adopt some system of procedure with respect to the effective *date* of the determination, so as to start the period of review; and it appears that the system adopted was to mail the contractor a letter-notice of the determination.

Since the Secretary, under the provisions of Section 403(e)(2) of the National Defense Appropriation Act, as amended by Section 701(b) of the Revenue Act of 1943, makes a unilateral determination that is subject to review, the effective date of such determination for the purposes of review is somewhat analogous to the question presented in the case of *Commissioner of Internal Revenue* v. *Estate of Edward T. Bedford,* decided by the Supreme Court on May 21, 1945.

In that case the opinion of the Court "reversing the decision of The Tax Court" was dated; but the order entered was not a *judgment*. The opinion is dated August 8, 1944, but the date of the judgment—being the determination—was not noted until August 29, 1944. The petition for review was filed in the Supreme Court within three months after the entry of an "Order for Mandate"; but after the expiration of three months from the *date* of the *opinion* which concluded with the term "order reversed". The term "order reversed" was entered as a minute on the Court records and signed by the Chief Judge. However, the Supreme Court holds the effective date of the *determination* or *judgment* was the entry date of the "Order for Mandate", which was August 29, 1944.

In the *Bedford case, supra,* the Court says:

"It does not detract from the 'Opinion' as an opinion that in its heading it gives as dates 'Argued January 6, 1944 Decided August 8, 1944', and that it concludes with 'The order of the Tax Court is reversed.' The same or similar phrases are commonly employed in opinions of this Court without changing their character as opinions. Nor do like phrases in the opinions of the other circuit courts of appeals turn them into judgments, since in all other circuits judgment orders are separately filed. In spite of its title, the 'Order for Mandate' on its face fulfills the function of such a judgment order. It recites that 'it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

ALEXANDER M. BELL,
Clerk

By A. DANIEL FUSARO,
Deputy Clerk.'

"This language plainly imparts that this is the judgment and that it is *then being rendered.*"

The *mixup* which prevailed in the *Bedford case, supra,* is somewhat analogous to the *mixup* in this proceeding as regards the *event* which starts the period of appeal to The Tax Court in this case. The written document called a "determination" requires no date. It was the opinion of the Chairman of the Price Adjustment Board of Reconstruction Finance Corporation that he believed "excessive profits" had been realized, and the date of such determination is the date the Treasurer of the corporation recorded the amount determined as a *claim,* and gave the contractor notice of July 6, 1944. The letter of the Treasurer is the final act by respondent to adopt the *determination* of the Price Adjustment Board, and for all practical purposes of Section 403(e)(2) of the Act, as amended, is the "date of

determination". The letter of July 6, 1944 is the only event which could possibly fix the *date of determination* within the meaning of the statute.

In the case of *United States ex rel Dascomb et al* v. *Board of Tax Appeals of the United States*, 16 Fed. (2d) 337, it is said:

> "It is familiar law that a decision is not final, within the meaning of the statute providing for an appeal, until disposition of an application for rehearing or reconsideration seasonably made and entertained. St. Clair v. Conlon, 12 App. D. C. 161; Doyle v. District of Columbia, 45 App. D. C. 90; Texas P. R. Co. v. Murphy, 111 U. S. 488, 4 S. Ct. 497, 28 L. Ed. 492; Kingman v. Western Mfg. Co., 170 U. S. 675, 18 S. Ct. 786, 42 L. Ed. 1192; United States v. Ellicott, 223 U. S. 524, 32 S. Ct. 334, 56 L. Ed. 535. We rule, therefore, that the letter of June 3, 1925, marked the close of the case by the Commissioner, and that the appeal was seasonably filed."

B. The decision of The Tax Court in this proceeding is subject to review.

The Tax Court is an independent agency in the Executive Branch of the Government, and has jurisdiction as is conferred by Congress. Proceedings of the kind of the present are conferred by Congress upon The Tax Court, and there is no limitation placed upon the review of its decisions on the question of jurisdiction. The only limitation on review is as to amount. The Tax Court has not determined "any amount" in this proceeding. Section 1141(a) of the Internal Revenue Code confers upon this Court jurisdiction to review decisions of The Tax Court, and there is no exception to such review provided by Section 403(e)(1) and (2) of the National Defense Appropriation Act, as amended by Section 701(b) of the Revenue Act of 1943, except in cases where The Tax Court determines the amount of "excessive profits". It is respectfully submitted that there is nothing in the legislative history of these statutes which supports

the contentions of respondents on review that this Court does not have jurisdiction of this appeal. Any question on the issue of jurisdiction is not limited as to review.

There has been no return of "excessive profits" alleged to be due in the sense that venue of this appeal is denied to this Court.

The Court of Appeals for the District of Columbia is logically the appellate tribunal to review a decision of The Tax Court on the question of the exercise of its basic jurisdiction; and the ultimate test of reviewability of the decision entered by The Tax Court in this case is not to be found in an over-refined technique, but in the need of the review to protect the petitioner from the irreparable injury threatened by a denial of its right—seasonably exercised—to have The Tax Court determine the *amount of excessive profits* demanded by the respondent in his *determination* of July 6, 1944. (See *Columbia Broadcasting System, Inc.* vs. *United States,* 316 U. S. 407.)

Action on the motion to dismiss filed by respondent will be determinative of the issue of review submitted to The Tax Court, of which it declined jurisdiction. The petitioner is not in default, if the jurisdiction of The Tax Court is rightly determined, and The Tax Court certainly does not feel itself to be without jurisdiction on the merits.

It is requested that the motion to dismiss be denied, and that the Court entertain jurisdiction of this appeal for the purpose of giving effect to the intent and purpose of Congress for a review of the case on the merits by The Tax Court of the United States.

Respectfully,

ROBERT A. LITTLETON,
FRANK H. ELMORE, JR.
Tower Building,
Washington 5, D. C.
Attorneys for Petitioner on Review

APPENDIX

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9051.

U. S. ELECTRICAL MOTORS, INC., a Corporation, *Petitioner*,

v.

JESSE H. JONES AND HANS A. KLAGSBRUNN, Members of the Board of Directors of Defense Plant Corporation, et al., *Respondents*.

On Petition to Review the Decision of the Tax Court of the United States.

JOINT APPENDIX.

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2 Filed Oct 2 1944

The Tax Court of the United States.

Docket No. 75-R

U. S. ELECTRICAL MOTORS, INC., 200 East Slauson Avenue, Los Angeles, California, a corporation, *Petitioner*,

v.

JESSE H. JONES, Shoreham Hotel, Washington, D. C., HANS A. KLAGSBRUNN, 3420 Q Street, Washington, D. C., members of the Board of Directors of Defense Plant Corporation, 811 Vermont Avenue, Washington, D. C., and CHARLES T. FISHER, JR., 2211 30th Street, N. W., Washington, D. C., CHARLES B. HENDERSON, 1524 33rd Street, Washington, D. C., HOWARD J. KLOSSNER, 1026 16th Street, Washington, D. C., HENRY A. MULLIGAN, 1429 Rhode Island Avenue, Washington, D. C. and SAM H. HUSBANDS, 3450 38th Street, N. W., Washington, D. C., members of the Board of Directors of Defense Plant Corporation and members of the Reconstruction Finance Corporation Price Adjustment Board, 2211 30th Street N. W., Washington, D. C., *Respondents*.

Petition.

The above-named petitioner hereby petitions the Court as follows, and alleges:

A.

1. Petitioner, U. S. Electrical Motors, Inc., is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 200 East Slauson Avenue, City of Los Angeles, State of California. It is now, and during 1942, and at all other times herein mentioned was engaged in the manufacture and sale of electric motors. Petitioner is a citizen of the State of California.

3 2. Respondents Jesse H. Jones, Charles B. Henderson, Howard J. Klossner, Sam H. Husbands, Hans A. Klagsbrunn, Henry A. Mulligan and Charles T. Fisher, Jr., are all individuals resident in the District of Columbia and are the duly appointed, qualified and acting members of the Board of Directors of Defense Plant Corporation, a subsidiary of the Reconstruction Finance Corporation created pursuant to the provisions of Section 5d(4) of the Reconstruction Finance Corporation Act as amended by the Act of June 25, 1940 (Public Law 664, 75th Cong. 2nd Sess., 54 Stat. 573). All of the respondents except Jesse H. Jones and Hans A. Klagsbrunn are now purporting to act as members of a Reconstruction Finance Corporation Price Adjustment Board, to which Board all of the respondents as members of the Board of Directors of Defense Plant Corporation have purported to delegate certain claimed statutory authority as hereinafter set forth.

3. This petition is filed under Section 701 of the Revenue Act of 1943.

The matter in controversy involves the question whether the amendment of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 made by Section 1 of the Military Appropriation Act, 1944, enacted July 1, 1943, can properly be construed to be retroactive to April 28, 1942, the effective date of the aforesaid Section 403, so as to apply to contracts made between petitioner and Defense Plant Corporation and subcontracts thereunder which were fully performed and finally paid for prior to the enactment of such amendment. This
4 amendment for the first time subjected contracts made by Defense Plant Corporation and subcontracts thereunder to the renegotiation provisions of the aforesaid Section 403. The matter in controversy further involves the constitutionality of such amendment if it should be construed retroactively so as to apply to contracts made between petitioner and Defense Plant Corporation and sub-

contracts thereunder which were fully performed and fully paid for prior to the enactment of such amendment.

The aforesaid Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public Law 528, 77th Cong., 2nd Sess., 56 Stat. 245, enacted April 28, 1942) is hereinafter called the "Act of April 28, 1942". The aforesaid Section 1 of the Military Appropriation Act, 1944 (Public Law 108, 78th Cong., 1st Sess., 57 Stat. 348, enacted July 1, 1943) is hereinafter called the "Act of July 1, 1943".

B.

4. During the year 1942, and for many years prior thereto and since then, petitioner was, and now is, engaged in the manufacture and sale of electric motors. For the most part, its products have been and are standard types of motors, which petitioner has offered for sale at standard prices which did not change throughout the year 1942 and thereafter.

5. During the year 1942 the Defense Plant Corporation and certain other persons, firms and corporations placed with petitioner numerous orders for the purchase from petitioner of certain of its products at petitioner's standard prices, which orders were accepted by petitioner, thereby creating contracts between petitioner and Defense Plant Corporation and petitioner and such other purchasers, respectively. Such purchasers, other than Defense Plant Corporation, as petitioner was then informed and believed, purchased such products from petitioner for the ultimate use of Defense Plant Corporation.

6. Pursuant to the orders so placed, and the contracts so made, petitioner during the year 1942 sold and delivered to Defense Plant Corporation and such other purchasers the products covered by said orders and contracts. The total of such sales which were made between April 29, 1942 and December 31, 1942, inclusive, and those made prior to

April 29, 1942, but which were not completely paid for by April 28, 1942, amounted to $277,223.95. All of said sales were delivered under contracts pursuant to which final payments were made to petitioner prior to June 30, 1943, and not less than $212,000.00 thereof were delivered under contracts pursuant to which such final payments were made prior to December 31, 1942.

All of said payments were made by such purchasers, respectively, unconditionally and unqualifiedly in satisfaction of completely performed contracts and at the time such payments were made Defense Plant Corporation neither had nor asserted contractual or statutory right to renegotiate or recover any part of such sums. The sums so received by petitioner became its private property and have at all times since been so treated by it.

7. The Act of April 28, 1942, among other things, authorized the Secretary of War, the Secretary of Navy, and the Chairman of the Maritime Commission, if in their
6 opinion excessive profits had been or were likely to be realized from contracts made with the war Department, Navy Department, or Maritime Commission to require the contractor to renegotiate such contracts, provided that final payment thereunder had not been made prior to the date of enactment of such Act on April 28, 1942. The Act of July 1, 1943 amended the Act of April 28, 1942 so as to include for the first time contracts of Defense Plant Corporation and subcontracts thereunder as subject to renegotiation and authorized the Board of Directors of Defense Plant Corporation to effect such renegotiation, which authority such Board of Directors has delegated in whole or in part to the respondents herein, other than Jesse H. Jones and Hans A. Klagsbrunn, as members of the Reconstruction Finance Corporation Price Adjustment Board. The respondents herein who are members of such Reconstruction Finance Corporation Price Adjustment Board and their duly authorized agents are hereinafter referred to as the "Price Adjustment Board".

8. By a communication dated October 14, 1943, the Price Adjustment Board advised petitioner that its 1942 transactions with Reconstruction Finance Corporation subsidiaries were now subject to renegotiation under the Act of April 28, 1942, as amended by the Act of July 1, 1943. Continuously since that time the Price Adjustment Board has asserted the right to renegotiate those contracts and subcontracts under which sales were made by petitioner to Defense Plant Corporation and to others for the ultimate use of Defense Plant Corporation during 1942, which were completely performed and fully paid for prior to July 1, 1943, the date of enactment of the Act of July 1, 1943,
7 and to require petitioner to repay substantial sums in respect to such contracts and subcontracts. By means of a communication dated July 6, 1944, a true copy of which is attached hereto, marked Exhibit A, and made a part hereof, the Price Adjustment Board advised petitioner that it is required to repay in respect to its sales in 1942 to Defense Plant Corporation and others for the ultimate use of Defense Plant Corporation the sum of $36,000.00, less adjustment of taxes pursuant to Section 3806 of the Internal Revenue Code, which would require petitioner to make a net cash repayment of $7,200.00. Said communication of July 6, 1944 referred to a signed copy, dated June 14, 1944, of a Determniation and Order entered by said Board in proceedings for the renegotiation of profits realized under petitioner's contracts and subcontracts during its fiscal year ended December 1, 1942, which signed copy of such Determination and Order was sent to petitioner with said communication of July 6, 1944, and petitioner annexes hereto and makes a part hereof a true copy of such Determination and Order.

In said communication of July 6, 1944, the Price Adjustment Board requested petitioner to pay to such Board the aforesaid sum of $7,200.00. In response to such communication of July 6, 1944, petitioner, by a communication dated July 27, 1944, notified said Board that it could not accept

or agree to such Determination and Order, for the reasons set forth in prior correspondence between petitioner and the Board. In said prior communications, dated April 10, 1944, February 18, 1944 and also orally on December 21, 1943, petitioner advised the Price Adjustment Board that petitioner believed and was of the opinion that the Act of July 1, 1943 should not be construed as retroactive to the extent of conferring any authority upon the respondents to renegotiate petitioner's Defense Plant business completed and paid for prior to July 1, 1943, and that such Act would be unconstitutional if interpreted as being retroactive in this regard.

9. In acting and threatening to act as set forth in paragraph 7 above, respondents are attempting to proceed solely under the purported authority of the Act of July 1, 1943, claiming such Act to be retroactive to April 28, 1942 so as to include plaintiff's contracts with Defense Plant Corporation fully performed by both parties thereto and finally paid for by Defense Plant Corporation prior to July 1, 1943.

10. The Act of July 1, 1943, is not retroactive and respondents have no statutory or other authority to renegotiate or otherwise require petitioner to repay any sums paid to it under contracts made with Defense Plant Corporation or subcontracts thereunder (which were fully performed by both parties thereto and finally paid for) prior to July 1, 1943, the date of enactment of such Act.

11. The Act of July 1, 1943, if construed to be operative retroactively, and to confer upon respondents the statutory authority which they assert, would be violative of the Constitution of the United States and the rights guaranteed to petitioner thereby in that such Act and respondents' action under its purported authority as set forth above would deprive petitioner of its property without due process of law and constitute a taking of petitioner's private property for public use without just compensation in violation of Amend-

ment V to the Constitution of the United States,
9 would vest judicial power in the respondents otherwise than as a duly ordained and established inferior court, thereby violating Article III, Section 1 thereof, and would be beyond any power delegated to the United States and therefore in violation of Amendment X thereto.

Wherefore, petitioner prays that the Court make its order determining that:

(1) Respondents have not the authority to renegotiate or otherwise require petitioner to repay any sums paid to it pursuant to contracts made with Defense Plant Corporation and subcontracts thereunder which were completely performed by both parties thereto and finally paid for by Defense Plant Corporation prior to July 1, 1943, the date of enactment of the Act of July 1, 1943;

(2) The Act of July 1, 1943, if construed so as to authorize the respondents to renegotiate petitioner's transactions with Defense Plant Corporation which were completely performed by both parties and finally paid for by Defense Plant Corporation prior to July 1, 1943, is unconstitutional under the Constitution of the United States and violative of petitioner's rights thereunder;

(3) Petitioner have such further and other relief as the nature of the case may require and as to the Court may seem just and proper.

U. S. ELECTRICAL MOTORS INC.
By /s/ GEORGE T. PFLEGER
President
200 East Slauson Avenue
Los Angeles, California

/s/ J. LEWIS FURMAN
Attorney for Petitioner
200 East Slauson Avenue
Los Angeles, California

* * * * * * * * * *

Exhibit A.

11 RFC PRICE ADJUSTMENT BOARD

Washington 25, D. C.

Defense Plant Corporation
Defense Supplies Corporation Jul 6 1944
Metals Reserve Company
Rubber Reserve Company

U. S. Electrical Motors, Inc.
Los Angeles 54, California

Gentlemen:

Enclosed is a signed copy, dated June 14, 1944, of a Determination and Order entered in proceedings for the renegotiation of profits realized under your contracts and subcontracts during your fiscal year ended December 31, 1942, pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as last amended July 14, 1943 and as affected by Title VII of the Revenue Act of 1943.

You will observe, from an examination of that document, that this Board has determined that $36,000 of profits realized by you during the fiscal year under review were excessive, and that under its terms you are ordered and directed to repay excessive profits in that amount less the amount of any tax credit to which you may be entitled pursuant to Section 3806 of the Internal Revenue Code. Your Internal Revenue Agent in Charge, in a letter dated May 25, 1944 (a copy of which is enclosed), has informed this Board that the aggregate amount of the credit to which you are thus entitled is $28,800.

Accordingly, under the terms of the Determination and Order referred to, you are required to pay to this Board the sum of $7,200, which you are requested to remit to us by return mail in the form of a certified check or draft made payable to the order of the "RFC Price Adjustment Board". The check or draft should be mailed to the RFC

Price Adjustment Board, 811 Vermont Avenue, N. W., Washington (25), D. C., to the attention of the under signed.

Very truly yours,

(Sgd) FACIUS W. DAVIS

Facius W. Davis
Treasurer

Enclosures

12
LA:FA:EIS

13
417 South Hill Street
May 25, 1944

In re: U. S. Electrical Motors, Inc.
200 East Slauson Avenue,
Los Angeles, California
Year Ended December 31, 1942.

R F C Price Adjustment Board,
811 Vermont Ave., N. W.,
Washington 25, D. C.

Attention: Mr. J. C. Moroney,
Assistant General Counsel.

Gentlemen:

Reference is made to the renegotiation of war contracts in the above-designated case, involving an off-setting tax credit, as provided in Section 3806(b) of the Internal Revenue Code, against the amount of the excessive profits to be eliminated to the extent by which the taxes for the taxable year are to be decreased by reason of the application of the provisions of paragraph 1 of subsection (a) of Section 3806.

On the basis of the returns filed by the taxpayer for the above-mentioned taxable year, and upon the understanding that profits in the amount of $36,000.00, which have been determined to be excessive were included in income in the returns, the amounts by which the taxes for the taxable year

covered by such returns are decreased by reason of the application of paragraph (1) of subsection (a), for the purposes of Section 3806(b) (1) of the Internal Revenue Code, are as follows:

Income tax and surtax, Chapter 1, None; surtax, Chapter 2A, None; Declared value excess profits tax, Chapter 2B, None; tax under Chapter 2D, None; excess profits tax, Chapter 2E, $28,800.00, aggregating $28,800.00. Provided, it be further understood that the computation of the foregoing amounts has been based upon the assessments made to date of such taxes, whether or not paid.

13 Please furnish this office, in duplicate, as soon as the renegotiation settlement is finally concluded, the amount of the offsetting tax credit allowed in the settlement.

Very truly yours,

(Signed) GEORGE D. MARTIN
Internal Revenue Agent in Charge.

EIS:LLC
cc this letter enclosed
cc to taxpayer

14 JUL 3 1944

RFC PRICE ADJUSTMENT BOARD
DETERMINATION OF EXCESSIVE PROFITS

WHEREAS, U. S. Electrical Motors, Inc., a corporation, of Los Angeles, California (hereinafter referred to as the "Contractor") has heretofore entered into certain contracts or subcontracts, or both, hereinafter collectively referred to as "said contracts and subcontracts", which are subject to renegotiation pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as last amended July 14, 1943 and as affected by Title VII of the Revenue Act of 1943 so far as applicable (such

Section 403 as so amended and affected being herein called "Section 403") and which are respectively classified as (a) contracts by Contractor with one or more of the following subsidiaries of the Reconstruction Finance Corporation, namely, Defense Plant Corporation, Defense Supplies Corporation, Metals Reserve Company and Rubber Reserve Company; and (b) subcontracts entered into by Contractor under contracts between other contractors and one or more of those subsidiaries; and

WHEREAS, the Boards of Directors of the subsidiaries of Reconstruction Finance Corporation have respectively delegated (under subsection (f) of Section 403) to the RFC Price Adjustment Board (herein sometimes called the "Board"), by appropriate authority, all of the power, authority and discretion vested in them under Section 403; and

WHEREAS, renegotiation has taken place between the Board and Contractor, pursuant to the provisions of Section 403 and pursuant to such delegation, for the purpose of eliminating excessive profits realized by the Contractor during its fiscal year which ended December 31, 1942, under said contracts and subcontracts; and

WHEREAS, as a basis for said renegotiation the Board has considered certain financial, operating and other data, submitted by the Contractor or obtained by the Board from governmental or other reliable sources, relating to the profits realized by the Contractor during said fiscal year under said contracts and subcontracts; and

WHEREAS, the Contractor has been granted the opportunity to submit such information and to present such contentions as the Contractor deemed material in determining the excessiveness of said profits and the renegotiability of such contracts and subcontracts, and due consideration has been given to the financial, operating and other data and

information so furnished or obtained and each of the contentions so presented;

NOW, THEREFORE, pursuant to the power, authority and discretion vested in the respective Boards of Directors of the aforesaid subsidiaries of the Reconstruction Finance Corporation under the provisions of Section 403, as thus delegated to the Board, it is hereby found and determined by the RFC Price Adjustment Board:

1. That $36,000 of the profits realized by the Contractor during its fiscal year ended December 31, 1942 under said contracts and subcontracts are excessive.

2. That in connection with the payment or discharge by any means of the amount of excessive profits hereby found and determined to have been realized by the Contractor, the Contractor shall be credited with any amount to which it may be entitled under Section 3806 of the Internal Revenue Code as computed by the Commissioner of Internal Revenue.

Accordingly, it is hereby ordered and directed that the excessive profits so found and determined, less any such tax credits, shall be eliminated by any one or more of the methods provided for in Section 403; and that the appropriate representatives of the Board and of the aforesaid subsidiaries of the Reconstruction Finance Corporation shall take any and all action which may be necessary or desirable to effect such elimination.

RFC PRICE ADJUSTMENT BOARD
By (Sgd) CHARLES T. FISHER, JR.
CHARLES T. FISHER, JR.
Chairman of the RFC Price Adjustment Board

June 14, 1944

* * * * * * * * * *

16 Filed Nov 16 1944

Motion to Dismiss Petition for Lack of Jurisdiction

(Filed November 16, 1944)

Come now the respondents, by the Assistant Attorney General of the United States, and moves the Court that the petition be dismissed for lack of jurisdiction.

FRANCIS M. SHEA,
Assistant Attorney General.

Wm. V. CROSSWHITE,
Attorney, Department of Justice.

17 **Memorandum in Support of Motion**

The unilateral determination of petitioner's excessive profits for its fiscal year ended December 31, 1942, was made by the RFC Price Adjustment Board on June 14, 1944. One Hundred and ten (110) days later, that is, on October 2, 1944, the petitioner filed its petition in this Court for a redetermination of its excessive profits for said fiscal year. Section 403(e)(2) of the Renegotiation Act provides inter alia that:

> "* * * any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year [i. e., a fiscal year ending before July 1, 1943], as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, *within ninety days* (not counting Sunday or a legal holiday in the District of Columbia as the last day) *after the date of such determination,* file a petition with The Tax Court of the United States for a redetermination thereof. * * *" (Italics supplied)

Section 403(a) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, provides inter alia that:

> "* * * in the case of the Defense Plant Corporation, Metal Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term 'Secretary' means the board of directors of the appropriate corporation."

The boards of directors of Defense Plant Corporation, Metal Reserve Company, Defense Supplies Corporation and Rubber Reserve Company have established the RFC
18 Price Adjustment Board and have delegated to it all power, authority and discretion vested in such corporations under the provisions of the Renegotiation Act (Joint Renegotiation Manual, Par. 137).

Pursuant to paragraph II(i) of Rule 64 of this Court, petitioner has appended to its petition, as part of Exhibit A, a copy of the determination and order by the RFC Price Adjustment Board. The copy of said determination and order bears the date of June 14, 1944, which was subsequent to the date of the enactment of the Revenue Act of 1943, that is, February 25, 1944, and it involves excessive profits for "a fiscal year ended before July 1, 1943." Accordingly, this proceeding must be governed by the above provisions of the Renegotiation Act and, therefore, it follows that since the petition was not filed "within 90 days * * * after the date of such determination" this Court has no jurisdiction to entertain it.

As already stated, the petition was filed on October 2, 1944, 110 days after June 14, 1944, the date of the Board's determination and order. The 90 days provided for in the Renegotiation Act, within which the present petitioner could have filed its petition in order for this Court to acquire jurisdiction, expired on September 12, 1944.

This Court has in numerous instances passed upon
19 an analogous situation with respect to filing appeals from a deficiency notice sent to a taxpayer by the

Commissioner of Internal Revenue. Inasmuch as this Court is a body of limited jurisdiction, it has constantly refused to take jurisdiction of cases in which the petition was not filed within the required period. See Wm. Frantze & Co., Inc., 1 B. T. A. 26; Teasdale & Co., 5 B. T. A. 1244; Stebbins Estate, 40 B. T. A. 612, affirmed 121 F. (2d) 892.

It would also appear that this Court should be controlled by the reasoning of the Supreme Court in the case of United States v. Michel (1931) 282 U. S. 656, wherein it was held that the fact that the plaintiff did not receive notice of the signing of the rejection schedule until more than two years thereafter will not extend the two year period after the disallowance of the claim [i. e., the signing of the rejection schedule by the Commission] within which suit for refund must be begun.

The petition in question was filed after the time permitted by the statute. The Court should, accordingly, dismiss it for lack of jurisdiction.

Respectfully submitted,

FRANCIS M. SHEA,
Assistant Attorney General.

Wm. V. CROSSWHITE,
Attorney, Department of Justice.

* * * * * * * * * *

20 **Order of Dismissal**

The respondent has moved to dismiss this petition for lack of jurisdiction because the petition was not filed within 90 days after the date of the determination of excessive profits. The parties were heard on this motion.

There is attached to the petition, as a basis for the jurisdiction of the Tax Court, a copy of the determination of excessive profits made by the R.F.C. Price Adjustment Board. There is also attached to the petition a copy of the letter of transmittal accompanying this determination. The

letter of transmittal from the R.F.C. Price Adjustment Board is dated July 6, 1944, and it states that "Enclosed is a signed copy dated June 14, 1944, of a Determination and Order entered in proceedings for the renegotiation of profits realized under your contracts and subcontracts during your fiscal year ended December 31, 1942 * * *. The date of June 14, 1944 is shown on the determination. The allegations of the petition which purport to show jurisdiction in this Court refer to the date of the determination as June 14, 1944. The petition was not filed until October 2, 1944, which was the 110th day after June 14, 1944. The Tax Court, under such circumstances, has no jurisdiction.

Counsel for the petitioner in his argument on the motion points out the fact that the date of July 3, 1944 also appears on the determination of excessive profits, and that the petition was timely filed, if that may be regarded as the date of the determination. However, it is not alleged in the petition that July 3, 1944 was the date of determination, it is not now contended that it was the date of determi-
21 nation, and the facts of record indicate that it was not the date of determination but that June 14, 1944 was the date of determination. Thus, the petitioner has failed to show that this Court has jurisdiction in this proceeding. It is

ORDERED, that the proceeding is dismissed for lack of jurisdiction.

(s) J. E. MURDOCK,
Judge.

Enter:

ENTERED FEB. 28, 1945.

* * * * * * * * * *

22 In the United States Court of Appeals for the District of Columbia

The Tax Court of The United States

Docket No. 75-R

Filed May 23 1945

U. S. Electrical Motors, Inc., 200 East Slauson Avenue, Los Angeles, California, a corporation, *Petitioner on Review*

v.

Jesse H. Jones, Shoreham Hotel, Washington D. C.,
Hans A. Klagsbrunn, 3420 Q Street, Washington, D. C., members of the Board of Directors of Defense Plant Corporation, 811 Vermont Avenue, Washington, D. C., and
Charles T. Fisher, Jr., 2211 30th Street, N. W., Washington, D. C.,
Charles B. Henderson, 1524 33rd Street, Washington, D. C.,
Howard J. Klossner, 1026 16th Street, Washington, D. C.,
Henry A. Mulligan, 1429 Rhode Island Avenue, Washington, D. C., and
Sam H. Husbands, 3450 38th Street, N. W., Washington, D. C., members of the Board of Directors of Defense Plant Corporation and members of the Reconstruction Finance Corporation Price Adjustment Board, 2211 30th Street, N. W., Washington, D. C., *Respondents on Review.*

Petition for Review of Decision of the Tax Court of the United States

To the Honorable Judges of the United States Court of Appeals for the District of Columbia:

Now comes U. S. Electrical Motors, Inc., a corporation, by Frank H. Elmore, Jr., its attorney, and respectfully shows:

23

I.

Jurisdiction

The petitioner on review is a corporation duly organized and existing under the laws of the State of California, and has its principal place of business at Los Angeles, California.

The order of the Tax Court dismissing the petition was entered on February 28, 1945. The jurisdiction of the United States Court of Appeals for the District of Columbia is invoked under the provisions of 26 U. S. C., Sections 1141 and 1142.

II.

Prior Proceedings

The unilateral "determination of excessive profits" involved in the proceeding below was made by the RFC Price Adjustment Board after the date of enactment of the Revenue Act of 1943, that is, February 25, 1944, with respect to petitioner's profits for the fiscal year ended December 21, 1942.

The determination states, among other things, that it was made:

". . . pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as last amended July 14, 1943, and as affected by Title VII of the Revenue Act of 1943, so far as applicable . . ."

Subsequent to July 6, 1944, petitioner received by mail from the RFC Price Adjustment Board, a copy of a "Determination of Excessive Profits", together with a transmittal letter dated July 6, 1944. Copies of such determination and letter are appended to the petition below.

Reference to such "determination" shows that it bears two different dates, namely, the date of "July 3, 1944" in the upper right hand corner of the first page, and the date of "June 14, 1944" in the lower left hand corner of the second page.

24 The petition below was filed on October 2, 1944, under the provisions of Section 403(e)(2) of the Renegotiation Act, which, so far as applicable, provides inter alia:

". . . any such contractor or subcontractor *aggrieved* by a *determination* of the secretary *made* on or after the date of enactment of the Revenue Act of 1943, with respect to any such fiscal year [i.e., a fiscal year ending before July 1, 1943] . . . may, within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such *determination* file a petition with the Tax Court of the United States for a redetermination thereof . . ." (Emphasis ours.)

III.

Nature of the Controversy

The respondents below moved to dismiss the petition on the allegation that the unilateral determination was made on June 14, 1944, which it was claimed was the date appearing on the copy of the determination attached to the petition. They contended that since the petition was not filed within 90 days after such date, the Court should decline to accept jurisdiction.

The petitioner contended that the respondents were in error in asserting that the 90-day period started to run from the date appearing on the determination; that the 90-day period commenced from the time of the issuance of the determination and the mailing of notice thereof to the contractor; that even assuming for the purpose of argument that the date on the determination was the date of the commencement of the 90-day period, that there existed a serious question of fact as to whether such date was June 14, 1944, or July 3, 1944, as both dates appeared on the copy of the determination, and that since the state of the record did not definitely establish the date of June 14, 1944, the motion should be denied.

Petitioner further contended that in view of the question of fact raised by the two different dates appearing on the determination, a summary determination on the basis of the record would be inequitable; that clear and convincing proof of the date of such determination should be required, and to that end the Court should order a hearing under Rule 19 of the Rules of the Tax Court to determine such question of fact.

IV.

The Decision to be Reviewed

The Tax Court of the United States summarily dismissed the proceeding for lack of jurisdiction, holding that it was not alleged in the petition that July 3, 1944 was the date of determination, that it was not contended before that court that said date was the date of determination, and that the facts of record indicated that it was not the date of determination but that June 14, 1944 was the date of determination.

Wherefore, the Petitioner on Review prays that this Honorable Court review the Decision and Order of The Tax Court of the United States and reverse and set same aside, and that a transcript of the record be prepared in accordance with the law and with the rules of said Court, and transmitted to the Clerk of the United States Court of Appeals for the District of Columbia for filing, and for such other and further relief in the premises generally as the nature of the case may admit and to this Honorable Court may seem meet and proper.

/s/ FRANK H. ELMORE, JR.
1009 Tower Building,
Washington, D. C.
Attorney for Petitioner on Review

• • • • • • • • • • •

No. 9051

United States Court of Appeals

DISTRICT OF COLUMBIA

U. S. ELECTRICAL MOTORS, INC., PETITIONER ON REVIEW

v.

JESSE H. JONES ET AL., RESPONDENTS ON REVIEW

BRIEF FOR RESPONDENT ON REVIEW

JOHN F. SONNETT,
Assistant Attorney General.

E. E. ELLISON,
WM. V. CROSSWHITE,
WALKER W. LOWRY,
Attorneys, Department of Justice.

United States Court of Appeals
for the District of Columbia

FILED DEC 6 1945

Joseph W. Stewart

CLERK

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9051

U. S. ELECTRICAL MOTORS, INC., PETITIONER ON REVIEW

v.

JESSE H. JONES ET AL., RESPONDENTS ON REVIEW

BRIEF FOR RESPONDENT ON REVIEW

OPINION BELOW

The opinion of the Tax Court, which is as yet unreported, appears at page 16 of the Joint Appendix.

JURISDICTION

This petition is to review an order of the Tax Court of the United States, dated February 28, 1945, dismissing for lack of jurisdiction a petition filed pursuant to the provisions of the Renegotiation Act for a redetermination of the amount of excessive profits. Petitioner asserts that this Court has jurisdiction under the provisions of Section 1141 (a) of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the order of the Tax Court.
2. Whether the petition was filed with the Tax Court within the statutory period.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pages 22 to 25.

STATEMENT OF THE CASE

Petitioner seeks a review by this Court of a decision by the Tax Court that petitioner's application for a redetermination by the Tax Court of its excessive profits was filed too late. The petition in the Tax Court was filed pursuant to § 403 (e) (2) of the Renegotiation Act. The Government contends that this Court has no jurisdiction to review the decision of the Tax Court and, in any event, that the Tax Court decision was correct.

The Renegotiation Act provides for the administrative recapture of excessive profits realized by Government contractors and subcontractors on war business. The statute requires the named renegotiating departments to review the total profit of such contractors on war business and to make a determination as to the extent to which, if at all, that profit is to be considered excessive. A refund to the United States of the excessive portion of the contractor's profit is required [1] and, if the refund is not made voluntarily, the Government is authorized (§ 403 (c)) to take various steps to compel payment. Section 403 (e) of the Act further provides that any contractor aggrieved by the administrative determination of his excessive profits may have a redetermination, which is in effect a new renegotiation, in the Tax Court of the United States. The jurisdiction of the Tax Court to make this redetermination is exclusive and its decisions, by express provision of the statute (§ 403 (e) (1)) are made final and free from review by any court or other agency. Under the circumstances of this case, the statute allows the contractor 90 days from the date of the administrative determination within which to file its petition in the Tax Court.

By an amendment to the Act dated July 1, 1943, the Board of Directors of certain named subsidiaries of the Reconstruction Finance Corporation were given authority to make renegotiation determinations. That authority was delegated to the Reconstruction Finance Corporation Price Adjustment Board, the renegotiating agency in this case, and that Board, by a

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[1] These refunds now total, prior to tax credit, more than $6,000,000,000. Hearings, House Committee on Ways and Means, 79th Cong., 1st Sess., on H. R. 2628, p. 15.

formal document entitled "Determination of Excessive Profits" and signed on behalf of the Board by Charles T. Fisher, Jr., Chairman, determined that petitioner realized excessive profits in the amount of $36,000 during the year ending December 31, 1942 (J. App. 11–13).

The document bears two date notations, one of June 14, 1944, appearing on the second page below and to the left of the signature of the Chairman of the Board, and the second, "Jul. 3, 1944," in the upper right-hand corner of the first page. The notation of June 14, 1944, appears on the document at the place where formal Government documents are customarily dated. Such documents are ordinarily stamped at the time of mailing and the date of July 3, 1944 would seem to be a stamp of this character indicating that the instrument was sent on that day from the office of the Board to the Treasurer for transmittal to petitioner. The earlier date of June 14, 1944, was the date of the determination. Although it is quite possible for a determination made on June 14, 1944, to bear a transmittal date of July 3, 1944, a determination made on July 3, 1944 could not readily bear an earlier date. Furthermore any possible ambiguity as to the date of the determination was eliminated by the letter of July 6, 1944, from Mr. Davis, the Treasurer, to petitioner (J. App. 9–10). That letter, transmitting to petitioner a copy of the Determination, begins by saying:

> Enclosed is a signed copy, *dated June 14, 1944* of a Determination and Order entered in proceedings for the renegotiation of profits realized under your contracts and subcontracts during your fiscal year ended December 31, 1942. * * * [Italics supplied.]

On October 2, 1944, petitioner filed a petition in the Tax Court seeking review of the administrative determination. In that petition the date of the determination was stated to be June 14, 1944 (J. App. 6):

> Said communication of July 6, 1944 referred to a signed copy, *dated June 14, 1944,* of a Determination and Order entered by said Board in proceedings for the renegotiation of profits realized under petitioner's contracts and subcontracts during its fiscal year ended December 31,

> 1942, which signed copy of such Determination and Order was sent to petitioner with said communication of July 6, 1944, and petitioner annexes hereto and makes a part hereof a true copy of such Determination and Order. [Italics supplied.]

Since October 2, 1944 was 110 days rather than 90 days after June 14, 1944, the Tax Court dismissed the petition for lack of jurisdiction on the ground that it was filed too late (J. App. 16–17).

Petitioner filed here a so-called "Petition for Review" contending first that the 90-day period began to run from the date the notice of the determination was mailed to petitioner; and second, that the date of the determination was July 3, 1944 (J. App. 20). Petitioner's brief *now* argues apparently that the determination of the RFC Price Adjustment Board was not the formal document so entitled but rather the letter of transmittal of July 6, 1944. The Government moved to dismiss the petition here on the ground that this Court has no jurisdiction to entertain petitions to review Tax Court decisions on renegotiation matters. At the suggestion of the Court, the argument on the motion and the argument on the merits have been consolidated.

SUMMARY OF ARGUMENT

That the Tax Court was correct in concluding that the petition was not filed within the statutory period cannot be doubted. The statute provides that the petition must be filed within 90 days "after the date of such determination." This requirement cannot be modified by the Tax Court or this Court since the requirement is mandatory and jurisdictional—not merely incidental and procedural—and the statutory requirements for jurisdiction must be observed.

The determination referred to is "a determination of the Secretary." Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, provides *inter alia* "in the case of Defense Plant Corporation, Metal Reserve Company, Defense Supplies Corporation and Rubber Reserve Company, the term 'Secretary' means the Board of Directors of the appropriate corporation." The Boards of Directors of the De-

fense Plant Corporation, Metal Reserve Company, Defense Supplies Corporation and Rubber Reserve Company have established the RFC Price Adjustment Board and have delegated to it all power, authority and discretion vested in such corporations under the provisions of the Renegotiation Act (Joint Renegotiation Manual, Par. 137). The "determination" is therefore the formal document labelled "Determination of Excessive Profits" signed on behalf of the RFC Price Adjustment Board by its chairman, the body having authority to make such a determination. The petitioner recognized that this document was the "determination." The June 14, 1944 notation appears at the place where formal Government documents are customarily dated and therefore must have been the date when the determination was made since such date would hardly have been placed on a nonexistent determination. By letter dated July 6, 1944, the petitioner was so advised that the determination had been made on June 14, 1944. That the petitioner accepted this conclusion is evidenced by two additional facts: First, its communication of July 27, 1944; and second, its Tax Court pleading. Therefore, since the petition was not timely filed, the Tax Court order of dismissal was proper and valid and should be affirmed by this Court.

However, this Court has no power to review the Tax Court result. This petition attempts to invoke jurisdiction here to review a Tax Court decision on renegotiation matters. Neither the Renegotiation Act nor any other statute confers such jurisdiction on this Court. Congress, furthermore, by failing to include the review sections of the Internal Revenue Code in the list of Internal Revenue Code Sections applicable to renegotiation matters indicated plainly that this Court and the other circuit courts should have no such review powers. Tax Court decisions on the question confined to the exclusive jurisdiction of the Tax Court, that is, the determination *de novo* of a contractor's excessive profits, are specifically made exempt from review by any court or agency, and no exception is provided for a decision as to the timeliness of a contractor's petition.

Further demonstration that Congress conferred no review powers on renegotiation matters on this Court is provided in

abundance in the legislative history of the Renegotiation Act. First, the question of review of renegotiation determinations was discussed at length in congressional committees and debated in detail on the floors of the House and Senate, and no mention was ever made of circuit court action. Second, every expression in the legislative history supports and is consistent with the single theory that no Tax Court decision on any aspect of its activities with regard to renegotiation matters was to be subject to review, which is to say for purposes of this case that Congress confided to the Tax Court alone the solution of the not too difficult problem of determining the date of a determination and the computation of the 90-day period within which the petition for review could be filed. Finally and conclusively, the legislative history shows that Congress refused to accept an amendment to the law which would have had the effect of conferring on this Court that which the petitioner seeks to invoke.

ARGUMENT

1. This Court has no jurisdiction to review the order of the Tax Court dismissing the petition for redetermination

This Court and circuit courts generally have, of course, only such jurisdiction as is specifically conferred upon them by statute. *In re Philadelphia and Reading Coal & Iron Co.*, 103 F. (2d) 901 (C. C. A. 3, 1939). And numerous cases have held that the power of the circuit courts of appeal and this Court to review Tax Court decisions depends entirely on statute. *Commissioner of Internal Revenue* v. *Boeing*, 706 F. (2d) 305 (C. C. A. 9, 1939); *Commissioner of Internal Revenue* v. *Realty Operators*, 118 F. (2d) 286 (C. C. A. 5, 1941); *Commissioner* v. *Roosevelt and Son Inv. Fund*, 89 F. (2d) 106 (C. C. A. 2, 1937). It has also been held that there is no presumption in favor of the jurisdiction of the circuit courts or this Court to review Tax Court decisions. *Burnet* v. *White Eagle Oil and Refining Co.*, 58 F. (2d) 141 (C. C. A. 8, 1932). These cases recognize the obvious proposition that jurisdiction here depends entirely on an act of Congress conferring that jurisdiction.

There is no act of Congress conferring jurisdiction on this Court to review Tax Court decisions on renegotiation matters. Sections 1141 and 1142 of the Internal Revenue Code, which authorize the Circuit Courts and this Court to review tax matters, were deliberately omitted from the Renegotiation Act and the legislative history demonstrates that Congress had no intention that the circuit courts or this court would on renegotiation questions exercise review powers.

The provisions for Tax Court redetermination of excessive profits appeared in the Renegotiation Act for the first time on February 25, 1944, when the statute was amended and reenacted by the Revenue Act of 1943. Prior to that date, the statute was silent with respect to review of determinations of the renegotiating departments, although, as is hereinafter explained, it was recognized that every contractor did have access to the courts. The Tax Court provision first appeared in the Revenue Bill as it was reported by the House Ways and Means Committee. The Committee (H. Rep. 871, 78th Cong., 1st Sess., pp. 76 and 77), noted the absence of review provisions in the existing law, commented on the provision for Tax Court redetermination, noted that the jurisdiction of the Tax Court was exclusive and its decisions final, pointed out the advantages of *de novo* redeterminations, and explained the details of the procedure. Although the Committee was obviously explaining to Congress how renegotiation decisions were to be reviewed under the bill, no mention whatever was made of circuit court action. On the floor of the House, the review problem and the Tax Court provisions were debated in detail (Cong. Record, House, Nov. 24, 1943, pp. 10040 to 10042; Nov. 30, 1943, pp. 10250–10251).

Again there was no suggestion of any function in the circuit courts or this Court. The Senate Finance Committee held extensive hearings on the House bill and particular attention was given to the problem of review and reconsideration of administrative determinations of excessive profits. Representatives of various departments of the Government argued that to place this work with the Tax Court would overburden that tribunal and that the Court of Claims should be substituted as the redetermination forum. (Hearings, Senate Committee

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on Finance, 78th Cong., 1st Sess., on H. R. 3687, pp. 49, 386, 613, 990, 999, 1000, 1015, 1016, 1017, 1026, 1028, 1032, 1070.) Although the proposal for substituting the Court of Claims for the Tax Court was debated at great length, there was no suggestion whatever that any Tax Court decisions under the House bill were to be subject to circuit court review and, therefore, that the Court of Claims was to be substituted not only for the Tax Court but for the Tax Court as supplemented by this Court, the circuit courts, and, on certiorari, the Supreme Court. Considering the care with which the proposed substitution was examined, it is inconceivable that had either the House or the Senate intended any exercise of circuit court jurisdiction, no mention would have been made of that fact. The Senate Committee reported a bill substituting the Court of Claims for the Tax Court. The report discusses the question of review and redetermination of administrative determinations of excessive profits in detail, again without reference to any possible circuit court jurisdiction (S. Rep. 627, 78th Cong., 1st Sess., pp. 34, 109–110).

On the floor of the Senate the entire question of Court of Claims versus Tax Court action was debated at length, once more without mention of possible circuit court jurisdiction (Cong. Record, Senate, January 21, 1944, p. 585 & ff.). The Senate passed the bill as recommended by the Finance Committee. In conference, however (H. Rep. 1079, 78th Cong., 2d Sess.), the Court of Claims provision was eliminated and the Tax Court provision reinstated without any suggestion that the change gave circuit courts power to act. Further congressional debate in the Senate (Cong. Record, Senate, Feb. 7, 1944, p. 1334), and in the House (Cong. Record, House, Feb. 7, 1944, pp. 1363 and 1365; Feb. 23 and 24, 1944, pp. 2024 and 2043) again failed to indicate that the circuit court or this Court were intended to participate in renegotiation matters.

Since, as this legislative history so conclusively demonstrates, it was at no time the intention of Congress that the circuit courts or this Court should have a power to review any Tax Court decision related to renegotiation, it is scarcely surprising that the statute granting Tax Court relief makes no provision for circuit court review action. The effect of Sec. 403 (e) of the

statute was to add to such other opportunities as were available to the contractor for court action the right of Tax Court redetermination. Congress did not add to those available remedies the right to review by this Court or any Circuit Court of Tax Court decisions. Section 403 (e) defines Tax Court jurisdiction by saying:

> Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo.[2]

[2] The jurisdiction thus conferred on the Tax Court is in intent and in effect jurisdiction to conduct a new renogtiation. The duty of the Tax Court, it will be noted, is not to determine the amount of excessive profits on any particular contract except where the original determination is on that basis but rather the amount of the contractor's excessive profits on his total war business. In view of the many thousands of contracts and purchase orders executed each year by each of the significant producers of war materials, it was, of course, obvious from the very outset that renegotiation could not ordinarily proceed by an examination of each contract and of the profits earned on that contract. The segregation, therefore, of renegotiable from nonrenegotiable business, that is, of war business from commercial business, has always been made by standard accounting methods rather than by undertaking the impossible task of examining each agreement, and the statute specifically authorizes renegotiation on the basis of total war business (Sec. 403 (c) (1)). Since the Tax Court is to conduct what is in effect a new renegotiation, the Tax Court must determine *de novo* what portions of the contractor's business are subject to the statute. The Tax Court must, therefore, consider and decide, by the use of customary accounting techniques, what portion of the contractor's business had a war end use. With the area of renegotiable business thus defined, the Tax Court must allocate the contractor's total gross income between renegotiable and nonrenegotiable business, allocate production costs in the same manner, and, by subtracting costs of renegotiable business from gross income on renegotiation business, reach a figure representing the amount of profit which is subject to the Act. With "renegotiable profit" thus determined, the Tax Court must then reach a conclusion as to the portion, if any, of that profit which is excessive. This is the question over which the Tax Court has exclusive jurisdiction and as to which it makes a final determination.

The Section goes on to provide:

> For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency.

If Congress had intended, as petitioner argues, that this Court should have jurisdiction of this matter under the provisions of Sections 1141 and 1142 of the Internal Revenue Code, nothing would have been easier than to add those section numbers to the list of Code sections so carefully set forth in the statute. In the light of the complete absence of any suggestion in the legislative history of circuit court review action, this failure to list Sections 1141 and 1142 can mean only one thing, that neither Congress itself, nor any congressional committee, nor any member participating in the debates had any intention that the circuit courts or this Court should exercise review powers. Furthermore, had Congress expected that the circuit courts or this Court would review any Tax Court renegotiation decision, some change would surely have been made in the venue provisions of Section 1141. Subdivision (b) provides in part:

> (b) *Venue.*
>
> (1) *In general.*—Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of

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Obviously, however, in making the determination of the amount of excessive profits which must be refunded to the United States, the Tax Court, like all other tribunals, must determine the limits of its jurisdiction, that is, it must segregate that portion of the contrator's business which is subject to the statute from his ordinary commercial business. As a practical matter, this can be done, and Congress has recognized that it can be done, only by the application of recognized accounting techniques to the contractor's total business for the fiscal period.

> Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.
>
> (2) *By agreement.*—Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

Since in renegotiation there is no action by any "collector" and no "return of the tax in respect of which the liability arises" and no "Commissioner" and no "taxpayer," these venue provisions are, as applied to renegotiation, entirely incomprehensible; indeed, they fail to fix the venue of this case in this Court or in any circuit court of appeals. This merely illustrates the difficulties which develop when an attempt is made to confer court jurisdiction by implication and one may well inquire why, if Sections 1141 and 1142 of the Internal Revenue Code can be read into the Renegotiation Act by implication, the same thing may not be done with all the remaining sections of the Code.

Finally, if all this is not proof enough that this Court is without jurisdiction, there is the fact that the House Ways and Means Committee refused to adopt an amendment to the statute, the purpose of which was to confer on this Court and the circuit courts the jurisdiction here asserted. When the House Ways and Means Committee was considering H. R. 2628, the bill which extended the termination date of the Renegotiation Act through December 31, 1945, the National Association of Manufacturers proposed (Hearings, Committee on Ways and Means, House of Representatives, 79th Cong., 1st Sess., on H. R. 2628, p. 222):

> 2. Provision should be made for appeals from The Tax Court on questions of law. As in tax cases, disputes arising out of renegotiation determinations should have benefit of judicial review beyond The Tax Court.

Mr. E. C. Alvord, in presenting this proposal to the Committee, said (p. 175):

> The Revenue Act of 1943 states specifically that the provisions relating to review by the appropriate circuit court of appeals of a decision of The Tax Court do not apply to a decision on a renegotiation case. This question was settled in conference. I think some of the conferees thought otherwise, but the statute is very specific, as I read it, that there is no appeal on a question of law from The Tax Court of the United States. I need not remind you that in tax cases your appeal is only with respect to questions of law decided by The Tax Court of the United States.

The Committee, after a discussion which indicated plainly enough that there was to be no review of Tax Court renegotiation decisions, refused to adopt the proposed amendment and H. R. 2628, as it was reported from the Committee and as it became law (Public Law 104, 79th Cong., 1st Sess.), contained no change in the Tax Court provision. It is submitted that this refusal by the Committee which drafted the Tax Court provision to amend the bill to provide the jurisdiction for which petitioner argues, is itself a conclusive demonstration that the alleged jurisdiction does not exist.

This is not to say that a contractor is foreclosed from all access to the constitutional courts in connection with renegotiation matters. It has from the very outset been recognized by Congress that the procedures of renegotiation inevitably provide a forum in the Federal courts for the consideration of constitutional questions. The administrative determination of the amount of the contractor's excessive profits is not self-executing. Three collection methods are provided to the Government to compel payment of the claim and the exercise of any one of these methods will inevitably place the contractor in a position to obtain judicial action. The available methods are: (a) Withholding by the United States of amounts otherwise due the contractor, (b) Directions to prime contractors to withhold for the United States amounts otherwise due a subcontractor, and (c) Suit by the United States.

If this last method of collection is adopted, the action of the United States in the District Court will itself provide a judicial forum. If the second method is adopted, the forum is the District Court in which an action may be brought by the subcontractor against the prime contractor to enforce the contract obligation to pay. Cf. *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316 (1945). If the first method is adopted, the appropriate forum is the Court of Claims.[3] The contractor will not, of course, be able to obtain in such actions judicial consideration of amount questions for those questions are exclusively within the jurisdiction of the Tax Court. However, the Federal courts will in such actions decide constitutional questions and it is apparent from petitioner's Tax Court pleading that constitutional questions are the questions in which this litigant is primarily interested.

There is one further possibility for judicial relief for the petitioner which should be mentioned. A writ of mandate is sometimes employed to direct an administrative tribunal to assume jurisdiction to decide a question within its powers. If petitioner, upon dismissal of this appeal, applies to the district court for a writ of mandate to compel the Tax Court to hear it, it will be time enough then to argue and determine the

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[3] Revenue Act of 1943, Hearings before the Committee on Finance, United States Senate, 78th Cong., 1st Sess., on H. R. 3687, p. 990. The Revenue Act of 1943, Hearings before the Committee on Ways and Means, House of Representatives, 78th Cong., 1st Sess. on H. R. 2324, 2698 and 3015, pp. 109 and 110. Military Establishment Appropriation Bill, 1944, Hearings before the Subcommittee of the Committee on Appropriations, United States Senate, 78th Cong., 1st Sess. on H. R. 2996, p. 137.

Investigation of the Progress of the War Effort, Hearings before the Committee on Naval Affairs, House of Representatives, 78th Cong., 1st Sess., pursuant to House Resolution 30, p. 507:

"Mr. MAAS. What court would he go into?

"The ACTING CHAIRMAN. The Court of Claims.

"Mr. KENNEY. The question might come up either of two ways. We might make a determination of excessive profits and then file suit against the contractor.

"Mr. KLINE. In the district court.

"Mr. KENNEY. Which would be filed in the Federal district court.

"Mr. KLINE. That is, if you had already paid them.

"Mr. KENNEY. In the event we had issued an order of withholding, I assume the contractor in that case would file a suit in the Court of Claims."

question whether or not Congress intended that any Tax Court decision should be reviewed in any forum. However, it can scarcely be denied that the district court does have general power to issue writs of mandate and to that extent petitioner's position on mandamus will be better than its position here where it is applying for relief which is completely beyond the jurisdiction of the Court.

The attention which this brief gives to the problem of this Court's jurisdiction is scarcely warranted if consideration is confined to this case alone. Since the Tax Court was plainly right in its decision, it matters little to this case whether the ruling of this Court be on the merits or on the jurisdictional question. To renegotiation generally, however, it matters a great deal that the Court should not undertake to review Tax Court decisions on renegotiation matters. If this Court were to take to itself that jurisdiction, it could confidently expect petitions to review the Tax Court decisions in each of the 300 renegotiation cases which are pending before that tribunal. The burden thus gratuitously assumed by the Court would not only do much to defeat the discharge of the ordinary duties of this tribunal, but the assumption of that jurisdiction would grant to litigants what Congress has so assiduously denied, that is, the right to litigate endlessly on renegotiation matters. The policy of Congress it should be noted, is not motivated by any desire to protect the Government from litigation. It is motivated by a desire to grant to contractors, particularly to small contractors, the right to a redetermination of excessive profits without inviting expensive and virtually endless litigation. That such litigation is the consequence of petitioner's argument is plain enough, for surely if this Court were to accept review jurisdiction on the application of the petitioner, it would accept such jurisdiction on the application of the Government, and each contractor who invoked the Tax Court remedy might well find himself launched upon extended litigation having its ultimate conclusion not in the Tax Court, not in this Court, but in the Supreme Court itself. The cost of such litigation would for many small contractors be prohibitive. Congress took care,

therefore, to make Tax Court decisions final and it is submitted that this Court should accept the Congressional conclusion.

2. The petition was not filed with the Tax Court within the statutory period

It is the respondents' position that Section 403 (e) (2) of the Renegotiation Act of 1943, *supra,* requires that, before the Tax Court has jurisdiction to entertain such an appeal the contractor's petition must have been filed with the Tax Court within 90 days after the date of the determination of excessive profits by the Secretary. This requirement cannot be modified by the Tax Court or this Court since the requirement is mandatory and jurisdictional—not merely incidental and procedural—and the statutory requirements for jurisdiction must be observed. Since the instant petition was not filed as required by the statute, the Tax Court was without jurisdiction to hear the case and properly dismissed the petition. It is submitted that the authorities stated hereafter clearly substantiate this position.

The statute provides that a contractor or subcontractor may within 90 days after the date of the determination by the Secretary, file with the Tax Court a petition for redetermination of its excessive profits (Section 403 (e) (2), Renegotiation Act of 1943, Appendix p. 23). As a background for discussion of this matter it must be remembered that the Tax Court is a tribunal of limited jurisdiction and that whatever jurisdiction it may have is definitely prescribed by the statute creating it and responsible for its continued existence. This Court has heretofore in analogous cases involving tax matters correctly ruled that the requirement that petitions for redetermination be filed within a specific period after the mailing of the deficiency notice "is statutory and jurisdictional and is not merely procedural." *Lewis Hall Iron Works* v. *Blair,* 23 F. (2d) 972, 974, 57 App. D. C. 364, cert. den. 277 U. S. 592. This view was adopted by the Tax Court (formerly Board of Tax Appeals) in the beginning and has been consistently followed. See *Wm. Frantze & Co., Inc.* 1 B. T. A. 26; *Teasdale & Co.,* 5 B. T. A. 1244; *Stebbins' Estate, et al.,* 40 B. T. A. 612.

This Court has also stated in *Chambers* v. *Lucas,* 41 F. (2d) 299, 300, 59 App. D. C. 327, that:

> The proceedings for review of the Commissioner's determination by the Board are purely statutory, and must be observed to the letter. The court or the Board is not permitted to modify the statute or rule even for equitable reasons. The provision of the statute here under consideration is in the nature of a limitation upon the right of the taxpayer to avail himself of the right of appeal, and there must be a strict compliance with its provisions, if the taxpayer desires to take advantage of the right conferred.

See also *Stebbins' Estate, et al.* v. *Helvering, Commissioner of Internal Revenue,* 121 F. (2d) 892 (74 App. D. C. 21); *McCord* v. *Commissioner of Internal Revenue,* 123 F. (2d) 164 (74 App. D. C. 369). It would seem, therefore, that the only point of inquiry with respect to this phase of the matter is whether the petition was filed within the period required. That, in this case, depends upon the meaning of the phrase "date of the determination by the Secretary" as used in Section 403 (e) (2) of the Renegotiation Act of 1943. The Tax Court found that the date of the determination was June 14, 1944. (See Order of Dismissal, J. App. 16–17.) The general rule appears to be that the reviewing court is bound by the findings of the Tax Court if the record shows substantial evidence in support of the facts so found. Unless the finding by the Tax Court is arbitrary or unreasonable, without any support in the evidence, such findings should not be disturbed. This Court has in numerous cases followed this rule. For example, this Court has held in *Ayer* v. *Blair,* 25 F. (2d) 534, 535, (1928) 58 App. D. C. 110, that the findings of the Board (now the Tax Court) will not be disturbed if they are sustained by the pleadings and evidence. Chief Justice Martin, speaking for this Court in the case of *Rosenberg* v. *Commissioner of Internal Revenue* (1930) 37 F. (2d) 808, 810, stated that "it is the settled rule of this Court that the Board's [Tax Court] findings of fact should be accepted as final if sustained by substantial evidence." See also *Westmoreland Specialty Co.* v. *Burnet,* 57 F. (2d) 615, 616, (1932) 61 App. D. C. 95.

It is submitted that beyond question there is substantial evidence in the pleadings to support the finding of the Tax Court that the date of the determination was June 14, 1944. On the formal document entitled "Determination of Excessive Profits" the date of June 14, 1944 appears below and to the left of the signature of the chairman of the RFC Price Adjustment Board, the place where formal Government documents are customarily dated. A second notation on the order "Jul 3 1944" is undoubtedly the date when the instrument was sent from the office of the Board to the Treasurer for transmittal to the petitioner. The date of June 14, 1944 on the determination substantiates the fact that it was made on that date. For while it is quite possible for a determination made on June 14, 1944 to bear a transmittal date of July 3, 1944, it is unreasonable and illogical to assume that a determination made on July 3, 1944 would bear the date of June 14, 1944. However, any possible or remote doubt that there might have been as to the date of the determination was clearly dispelled by the letter of July 6, 1944 from Mr. Facius W. Davis, treasurer of the RFC Price Adjustment Board, to the petitioner (J. App. 9–10). In that letter Mr. Davis transmitted to the petitioner a copy of the determination and stated therein as follows:

> Enclosed is a signed copy, dated June 14, 1944, of a Determination and Order entered in proceedings for the renegotiation of profits realized under your contracts and subcontracts during your fiscal year ended December 31, 1942, pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as last amended July 14, 1943, and as affected by Title VII of the Revenue Act of 1942.

Here, in the plainest language possible, was advice to petitioner of the date of the determination by the Secretary. Furthermore, petitioner has itself recognized that the date of the determination was June 14, 1944. In the petition filed with the Tax Court (J. App. 2–8) on October 2, 1944, petitioner has stated in paragraph 8 thereof that—

> Said communication of July 6, 1944, referred to a signed copy, dated June 14, 1944, of a Determination and Order

> entered by said Board in proceedings for the renegotiation of profits realized under petitioner's contracts and subcontracts during its fiscal year ended December 1 [sic], 1942, which signed copy of such Determination and Order was sent to petitioner with said communication of July 6, 1944, and petitioner annexes hereto and makes a part hereof a true copy of such Determination and Order.

The petitioner further alleges in the same paragraph of its pleading that in response to such communication of July 6, 1944, it, on July 27, 1944 notified the RFC Price Adjustment Board that it could not accept or agree to such determination and order—

> for reasons set forth in prior correspondence between petitioner and the Board. In said prior communications, dated April 10, 1944, February 18, 1944 and also orally on December 21, 1943, petitioner advised the Price Adjustment Board that petitioner believed and was of the opinion that the Act of July 1, 1943, should not be construed as retroactive to the extent of conferring any authority upon the respondents to renegotiate petitioner's Defense Plant business completed and paid for prior to July 1, 1943, and that such Act would be unconstitutional if interpreted as being retroactive in this regard.

It will be noted that in the communication of July 27, 1944, the petitioner took no exception to the fact that the determination of June 14, 1944, was not mailed to him until July 6, 1944. Nor was this point mentioned in the pleading filed on October 2, 1944. Even at the hearing on February 28, 1945, on respondents' motion it was not contended that the date of the determination was other than June 14, 1944. (See Order of Dismissal, J. App. 16–17.) The first intimation that the date of the determination might be July 3, 1944, rather than June 14, 1944 is found in the Petition for Review of Decision of the Tax Court of the United States filed on May 23, 1945 in this Court (J. App. 18–21). It would *now* appear from

petitioner's brief that at this time it is contending that the date of the determination might be July 6, 1944.

Counsel for petitioner cites the case of *Commissioner of Internal Revenue* v. *Estate of Edward T. Bedford,* decided by the Supreme Court on May 21, 1945, as dealing with a problem analogous to the one in this case. In the *Bedford* case, the Supreme Court had to decide whether an "opinion" or the "Order for Mandate" should be considered the "Judgment" which started the running of the appeal period. Since the rules of the CCA (2d) from which the appeal arose were not clear and definite, the Court refused to decide the matter

> on nice-spun argumentation in disregard of the judicial habits of the court whose judgment is called into question, of the bar practicing before it, of the clerk who embodies its procedural traditions, as well as in conflict with the assumption of the reviewing court.

The difference between the two cases are apparent. The date of the determination was placed on the formal document; the petitioner was advised that the date was June 14, 1944; the petitioner acquiesced in such date and plead that the date of the determination was June 14, 1944; and the Tax Court found as a fact that the date of the determination was June 14, 1944. It would appear that the *Bedford* case, if at all analogous, would tend to support respondents' contention, as the Supreme Court was guided by the attitudes, practices and beliefs of the parties concerned in arriving at its conclusion. The facts in this case show that both parties and the Tax Court considered the date of the determination to be June 14, 1944. It is only now at this late date that there is a suggestion by petitioner that the date of the determination was other than June 14, 1944.

Therefore, it is submitted that there is ample and substantial evidence to support the Court's finding that the date of the determination was June 14, 1944. Since the petition was not filed until October 2, 1944, which was 110 days after June 14, 1944, the Tax Court's dismissal of the petition on the ground that it had no jurisdiction because the petition had

been filed too late is proper and should be affirmed by this Court.

As pointed out by the Court in its order of dismissal (J. App. 16–17) "it is not alleged in the petition that July 3, 1944, was the date of the determination, it is not now contended that it was the date of the determination, and the facts of record indicate that it [July 3, 1944] was not the date of the determination but that June 14, 1944, was the date of determination."

In its brief petitioner argues that before the statute starts to run there must "be a specific event of which the contractor had notice." Thus, petitioner now at this late date attempts to change and enlarge the language of the statute to mean that a petition may be filed within 90 days of the date of receipt of the notice to contractor of the determination of excessive profits. Congress has for reasons sufficient to itself provided that in cases such as the one at bar, the date within which a petition may be filed starts to run *from the date when the determination was made.* If, for example, it had been the intention of Congress that the time should not start until notice of the determination had been mailed to the contractor it would have been easy and simple to so state. It cannot be urged that the failure to provide in Section 403 (e) (2) for the mailing of such notice was an oversight because Section 403 (e) (1) which deals with years ending after June 30, 1943, provides that the 90-day period within which a petition may be filed runs from the date of the mailing of the order of the War Contracts Price Adjustment Board determining excessive profits. Therefore, it must be inferred that Congress definitely chose the language set forth in the statute.

It has been held that it is not necessary that the petitioner receive notice of an act in order to start the period running. It would appear that the reasoning of the Supreme Court in the case of *United States* v. *Michel,* 1931, 282 U. S. 656, wherein it was held that the fact that the plaintiff did not receive notice of the signing of the rejection schedule until more than two years thereafter will not extend the two-year period after the disallowance of the claim (i. e., the signing of the rejection schedule by the Commissioner) within which suit for refund

must be begun, is pertinent and should be controlling in this situation. Of course, in this case that is a moot question as it is not urged that the petitioner did not receive notice within time to file, as the pleadings and the evidence show that the petitioner had knowledge that the determination was made on June 14, 1944, in ample time within which to prepare and file its petition in the Tax Court within 90 days from June 14, 1944.

CONCLUSION

For the foregoing reasons, it is submitted that this Court has no jurisdiction of this appeal, and that, accordingly, the petition for review should be dismissed.

If, however, this Court should hold that it has jurisdiction to review the decision of the Tax Court, the decision of the Tax Court should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

THE RENEGOTIATION ACT, SECTION 403 (E)

(e) *Petition for redetermination; limitation, jurisdiction of the Tax Court; powers and duties of court; payment of fees and expenses; finality of determination.*—(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * *

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), * * * (U. S. C., Supp. IV, pp. 1090–1091).

THE INTERNAL REVENUE CODE, SECTIONS 1141, 1142

§ 1141. *Courts of review.*—(*a*) *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., title 28, § 346); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., title 28, § 347.)

(*b*) *Venue.*—(1) *In general.*—Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court

of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

(2) *By agreement.*—Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

(3) *Application of subsection.*—This subsection shall be applicable to all decisions of the Board rendered on and after May 10, 1934, and section 1102 of the Revenue Act of 1926, 44 Stat. 110, as in force prior to May 10, 1934, shall be applicable to such decisions rendered prior thereto, except that paragraph 2 of this subsection may be applied to any such decision rendered prior to May 10, 1934.

(c) *Powers.*—(1) *To affirm, modify, or reverse.*—Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

(2) *To make rules.*—Such courts are authorized to adopt rules for the filing of the petition for review, the preparation of the record for review, and the conduct of proceedings upon such review.

(3) *To require additional security.*—Nothing in section 1145 shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

(4) *To impose damages.*—The Circuit Court of Appeals, the United States Court of Appeals for the District of Columbia, and the Supreme Court shall have power to impose damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay (53 Stat. 164).

§ 1142. *Petition for review.*—The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318

of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered (53 Stat. 165) (26 U. S. C. §§ 1141, 1142).[1]

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[1] The petitioner on review relies on both sections of the Code to sustain its appeal.

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